

# Germany and COVID-19: A Most Eventful Year

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In January 2020, information about a highly contagious virus in Wuhan started to get public attention in Germany. Initially, as can be expected in times of crisis, it was mostly the executive that took action. Due to federal competence allocation, first acted the local authorities in their capacity as health authorities, soon joined by the governments of the federal states (Länder) and the federal government. By now, legislative amendments have formed a [massive body of Corona legislation](#), covering various aspects of economic and social life in Germany. The debate has mainly focused on questions of vertical and horizontal separation of powers, the role of expertise in the Covid response, and restrictions of fundamental rights as adjudicated by courts.

## The Legal Responses to COVID-19

As a first response on 30 January 2020, the federal health ministry issued a decree mandating reports of any infections with the “novel coronavirus that first appeared in Wuhan/People’s Republic of China in December 2019” ([2019-nCoV](#)), based on the until then little known “[Infection Protection Act](#)” (IPA) and its [§ 15](#). During February and March 2020, federal and Länder, including communal, executives continued to respond to the pandemic by issuing decrees, mostly without involvement of parliaments, mandating contact restrictions, closure of schools, universities, and shops.

In March 2020, a [supplementary federal budget](#) made available 122.5 billion Euros and allowed further borrowing of up to 156 billion Euros. This money is designated to help companies and employees, and to generally cushion the social repercussions of the pandemic. For example, financial help to pay employees in short-time was an important tool to prevent mass layoffs; the so-called [Kurzarbeitergeld](#), co-funded by employer and state, covers 60 % (for employees with children: 67 %) of the usual wage.

It was thus from the very beginning of the pandemic that the social effects of the measures taken to fight the virus were considered. And indeed, the gravest consequences seem to have been addressed. The promised Corona aid funds, however, [take very long](#) to reach businesses and companies. On closer inspection, huge disparities appear, too. To name one example: The lockdown of kindergartens and schools hit parents hard, and among them, single-parents (mostly women) were hit even harder. If we think of kindergartens and schools as an important factor equalising unequal social backgrounds of children, the closure of schools and the social support system for children will most likely lead to massive inequalities in educational progress. Decades of neglect for schools and their infrastructure,

especially when it comes to digitalisation, are now resulting in even bigger disparities, as success at school to a large extent depends on the parents and their ability to substitute for teachers or provide digital infrastructure.

In keeping with the principles of German federalism ([Art. 83 and 84 Basic Law](#)), the IPA is primarily implemented by the Länder, which initially relied on it to impose measures by executive decrees. These measures were designed to prevent the transmission of the virus between humans, to detect infections at an early stage and to prevent their further spread, in order to prevent deaths and an overburdening of the health system. Measures include: a minimum 1.5m physical distance between individuals, contact restrictions, bans on leaving the apartment (still allowing outdoor exercises), curfews; prohibitions of meetings, assemblies, religious and political gatherings; closure of kindergartens, schools and universities, of businesses, shops and restaurants, of museums and theatres, and of sports and cultural facilities; restrictions on visits to hospitals, retirement homes and other social institutions; prohibitions of travel for private reasons and to second homes; and finally, [as late as end of April](#), an obligation to wear a mouth-nose covering indoors, later also outdoors in public. Considerable variations in the Länder decrees allowed for exceptions or further restrictions. Eventually, this multitude of prohibitions and restrictions converged into a catalogue of standard measures. But they continued to be based on a very general provision in § 28 IPA, which is designed to permit individual measures in relation to infectious or possibly infectious people – not far-reaching measures targeting the population at large.

## **The Three “Acts on the Protection of the Population in the Event of an Epidemic Situation of National Significance”**

At the end of March 2020, the first “[Act on the Protection of the Population in the Event of an Epidemic Situation of National Significance](#)” introduced a new § 5 into the IPA, providing the federal health ministry with far reaching powers to introduce Corona measures by decree. These powers were triggered by the Federal Parliament (Bundestag) declaring an “epidemic situation of national significance” in plenary session; they were to cease as soon as Parliament declared the end of such a situation. No definition was given, though, of what constituted such an “epidemic situation of national significance”. The bill was rushed through Parliament in just one day, two days before it entered into force. On the same day, Parliament also declared an “epidemic situation of national significance”.

The new § 5 IPA was heavily criticised for transferring decree powers to the federal health ministry without setting limits, as constitutionally demanded by [Art. 80\(1\) BL](#). If the ministry is empowered to issue decrees that can deviate from and even change the requirements set by other Acts of Parliament, then this puts into question the rule of law.

Nonetheless, in May 2020, the “[Second Act on the Protection of the Population in the Event of an Epidemic Situation of National Significance](#)” brought few changes to the problematic transfer of powers to the federal health ministry.

It wasn't until November 2020 that the “[Third Act on the Protection of the Population in the Event of an Epidemic Situation of National Significance](#)” introduced a definition of the “epidemic situation of national significance” and added the new [§ 28a IPA](#). This norm finally introduced a proper legislative basis for the standard Corona measures and provides an extensive catalogue of permissible measures to be implemented by the Länder.

## Horizontal and Vertical Separation of Powers

While it was at first the Länder executives that reacted to the pandemic, soon, federal and Länder governments started to coordinate their activities. The biweekly or monthly meetings of the heads of government under the leadership of Chancellor Merkel (“Bund-Länder-Konferenzen”) became [much awaited media events](#). The steps agreed in these meetings were issued in decrees by the Länder governments; to the extent the Länder parliaments were involved at all, they merely executed what had been decided in the government meetings. The Federal Parliament only slowly took it upon itself to even discuss the Corona measures and the situation, with the aforementioned “Acts on the Protection of the Population” and other laws.

Still, the Bundestag has also merely been following what the government representatives have decided behind closed doors. § 28a IPA, for example, appears to be a step in the right direction because finally Parliament has legislated a catalogue of measures. But, as public health law expert [Andrea Kießling and others have pointed out](#) in a public hearing in the Bundestag, § 28a IPA merely rubber stamps the measures previously imposed by executive bodies and is still not properly defining the conditions under which these measures may be ordered. No amendments were decided, though, and the rule of law requirements are still not properly met.

As the meetings between federal and Länder governments continue, there is also growing criticism over their closed-door nature, which not only sets them apart from public deliberation in parliament (see, e.g., [Johannes Gallon](#)). The decisions are then implemented by way of executive decrees, leaving little to no room for public debate ex post facto. Apparently, political culture is shifting towards executive decisions even where parliaments could also decide. At least, though, governments [started to report](#) to parliaments on the situation and their actions.

## The Effectiveness of Judicial Scrutiny

A search in the legal database *Juris* (where many but not all German court decisions are reported) with the terms “Corona”, “COVID-19” and “SARS-CoV-2” leads to the breath-taking number of 3,736 decisions (as of 2 March 2021), of which 2,660 were delivered by administrative courts or the Federal Constitutional Court (FCC) over

the past year. Due to the rapid factual and legal developments, most (if not all) of these decisions concern requests for interim relief against specific measures or packages of measures, usually based on claims of fundamental rights violations. In the fully constitutionalised legal order in Germany, any administrative court is bound by the human rights and civil liberties enshrined in the bill of rights in the Basic Law ([Art. 1-19 BL](#)). [Art. 19\(4\) BL](#) guarantees a right to judicial review for any violations of these rights.

When deciding about interim relief, the courts do not fully review the case in substance, but base their decision on an assessment of probability: which decision will be more detrimental if later proven wrong? In this situation, my impression is that courts tend to focus on procedural and formal “mistakes” made by the administration when imposing the Corona measures: is there a proper legal basis for the measures that is sufficiently clear? Even though most Corona measures were based on the insufficient § 28 IPA (as the new § 28a IPA was only introduced in November 2020), the courts in summer and autumn 2020 still were very hesitant to repeal imposed measures on grounds of a missing legal basis.

## Protecting Human Rights and Civil Liberties

Apart from this, when it comes to civil liberties and human rights, the proportionality test took centre stage. It asks (1) for a legitimate aim, (2) whether the measure is suitable to reach this aim, (3) whether other less intrusive measures could be chosen, and, finally, (4) the famous balancing operation: is the restriction of the fundamental right adequate in light of the pursued aim? Considering the highest rank of human life, courts very understandably were hesitant to find against measures on grounds of them not being proportionate, i.e. stage (4). Rather, they focused on stages (2) and (3) which require scientific assessment more than legal evaluation.

For example, during the first lockdown governments had generally prohibited all religious services and all assemblies, including political demonstrations, without exemptions, even though they are especially protected in [Art. 4](#) and [8 BL](#). Throughout April 2020, the FCC struck down such overly broad prohibitions ([here](#), [here](#) and [here](#)), arguing that a less intrusive measure was to require appropriate hygiene concepts. During the summer, this led some administrative courts to allow anti-Corona demonstrations to go forward, even though it was clear that participants would likely not follow the hygiene concept because they did not believe that the virus was dangerous at all. In a side note, the [FCC](#) clarified that such demonstrations could very well be prohibited.

Concerns over unequal treatment play a major role in public debates. As everybody is equally affected by the virus, unequal sharing of the burdens of preventing it from spreading has increasingly turned into a veritable problem for the legitimacy of the measures. This fundamental question has also resulted in legal cases relying on the equal protection of the law, [Art. 3\(1\) BL](#). Other than requiring reasonable justification of unequal treatment (and in this similar to the [Wednesbury doctrine](#)), however, this legal review quite expectedly has mostly not resulted in any tangible correction of measures so far, and has led to vastly differing evaluations even of those measures

setting highly questionable and seemingly arbitrary thresholds (e.g., a [maximum of 800 square meters for shops](#) to be allowed to reopen). It seems that the traditional preponderance of freedom rights over equality concerns in judicial review also plays out here.

## The Role of Expertise and Public Deliberation

From very early on, public health experts, epidemiologists and virologists have been invited for hearings before political bodies, but it is not always scientific evidence that guides decisions. This was particularly noticeable after the summer had brought a measure of relief, allowing public life to return to some semblance of normalcy. In September and October 2020, the second wave of infections was well under way, as experts had warned [already in early August](#). But the second lockdown was delayed until November 2020, because the politicians were hesitant to impose restrictions yet again, only half a year after the first lockdown. Arguably, this delay contributed to [numerous deaths](#) in the second wave, whereas the first wave had been managed much better with the stricter and earlier lockdown. Political choices very obviously depend on science and growing knowledge about the exponential development of the virus and its mutations. The sheer facticity of the pandemic cannot be denied, political wishful thinking will not change the parameters of exponential growth. This seems not always clear in decisions to return to “normal” life with still high infection rates.

Not all choices are dictated by science, though. The deeply political nature of choices for or between measures such as partial or full lockdown, closure of economic sectors and educational facilities, mass testing and vaccinations etc. once again became evident. From a deontological standpoint on which human dignity as a fundamental right is based deaths have to be prevented by all means (“every death is one too many”, as [Bavarian Minister President Markus Söder](#) famously phrased it in March 2020), economic repercussions notwithstanding. A more utilitarian approach holds that [liberal societies accept certain deaths all the time](#), for example when allowing dangerous activities such as car traffic. The ensuing balancing operations are therefore not only highly complex, but also dependent on various political and ethical choices and preferences.

Especially the role of constitutional law expertise was hotly debated, with some professors voicing strongly worded opinions early on (“[fascist-hysterical hygienic state](#)”; “[state of exception](#)”). While the principle of proportionality was much used in public debates, the advice of constitutional law experts was less desired when they emphasised the importance of proper legal bases for the measures and the necessity of clear definitions of measures as a rule of law requirement. Recently, the chairman of the legal committee of the federal parliament even singled out two leading experts on public health law on [Twitter](#), insinuating they were cooperating with the far-right party AfD and with Corona deniers, and later tried to [justify](#) this outrageous and unprecedented personal attack. The strains are showing in the pandemic.

## 2021 Outlook

A strategy on how the mutations may be kept under control in the EU and its Member States, also in Germany, is still missing. A team of scientists under the label [#NoCovid](#) proposed a model of green and red zones, following the successful examples of Australia and New Zealand. It has yet to gather political momentum.

Currently, Germany is facing a third wave, now mainly of the mutation B.1.1.7. In early March 2021, counterintuitively, the federal and Länder governments have decided to loosen the restrictions and set higher thresholds in infection rates, raising them from 35 or 50 respectively to 100 – a new threshold that is not mirrored in the legal basis of the restrictions, [§ 28a\(3\) IfSG](#). Hence, the executive is getting rid of [legislative restraints](#), in itself a deeply worrying development. Before Easter 2021, the meeting of the federal and Länder governments had decided to add two holidays as a “wavebreaker” lockdown to stop the third wave (“[Osterruhetage](#)”). This measure, introduced late in the night of the 11 hour long meeting on 23 March 2021, was not at all legally checked, resulting in an astonishing [apology of Chancellor Merkel](#) who took back the extra holidays just a day later.

As I write these lines in early April 2021, the political situation is volatile since 2021 is an election year, beginning with a few Länder elections and leading up to the federal elections in September 2021. Inevitably, the fight against the virus has become a topic for the election campaigns. Loosening restrictions appears as a political strategy for some to attract voters while other politicians push for stricter measures. Once again, the deeply political nature of Corona measures becomes evident.

